Alcontara a/l Ambross Anthony v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-55-94
EDGAR JOSEPH JR, MOHAMED DZAIDDIN FCJJ AND GOPAL SRI RAM JCA
31 JANUARY 1996

Criminal Procedure *— Appeal — Misdirection — Trafficking of dangerous drug — Judge assuming belated disclosure of defence — Evidence suggested the contrary — Whether judge erred in handling facts — Whether misdirection — Whether conviction of accused to be quashed*

Evidence *— Burden of proof — Misdirection — Effect of — Accused charged with drug trafficking — Defence of innocent carrier — Accused gave defence from witness box — Consistent with cautioned statement made to police earlier — Trial judge criticized accused for not disclosing facts supporting his defence to investigating officer —Whether misdirection — Whether onus on prosecution to disprove accused's version of facts*

Evidence *— Presumption — Adverse inference — Failure of prosecution to produce search list as evidence — Acute conflict of evidence — Difference between result of search on accused and a search list contemporaneously prepared by police — Whether could draw inference that production of search list unfavourable to the prosecution — Evidence Act 1950 s 114(g)*

Evidence *— Hearsay — Admission of — Hearsay evidence admitted in favour of prosecution — No objection from defence — Whether trial judge under duty to exclude evidence*

Criminal Law *— Dangerous Drugs Act 1952 — Statutory presumption — Accused charged with drug trafficking under s 39B(1)(a) — Trial judge did not direct attention to statutory presumptions as to possession under s 37(d) and trafficking under s 37(da) — No finding as to whether defence had rebutted the same — Whetner amounted to misdirection by way of non-direction — Dangerous Drugs Act 1952 ss 37(d), (da) & 39B(1)(a)*

The appellant was charged with trafficking cannabis in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). His defence, as deposed to from the witness box, was that he was an innocent carrier. He claimed that he sold prawn crackers for a living, and that at the time of his arrest, he honestly believed that he was conveying prawn crackers at the behest of a certain Che Mat, for a fee of RM300. This defence was consistent with his cautioned statement made to the police on the day after his arrest ('the cautioned statement'), for in it, he had mentioned about Che Mat, his telephone number, and his place of abode. The trial judge found that the prosecution had established a case of exclusive possession, custody, control and knowledge of the cannabis recovered from the appellant, and that the appellant's explanation had failed to raise a reasonable doubt. In the grounds of his judgment, the judge, suggested that the appellant had sufficient time to concoct his story about the transportation of prawn crackers, since his statement was made a day

after his arrest. The judge had also criticized the defence for not having put to the investigating officer Che Mat's particulars, and his failure to explain why, according to ASP Abdul Wahab, it was stated in the search list served on him on the morning of the arrest that only RM63 was found on him in his wallet, despite the fact that the appellant had alleged that he was paid RM300 by Che Mat. The appellant was convicted and sentenced to death. The appellant appealed on the grounds that the judge had criticized the defence in terms which were unjustified.

Held, allowing the appeal:

(1) The judge had erred in his handling of the facts when considering the defence case. He had assumed that there had been a belated disclosure of the defence thereby suggesting concoction. However, the evidence suggested that the first opportunity the appellant had to offer an explanation was the day after his arrest, when he was interviewed and his statement was recorded. There was no evidence of delay on his part in offering an explanation. The judge had therefore misdirected himself, and this should be treated in the same way as an erroneous direction to a jury. On this ground alone, the conviction had to be quashed (see pp 215F–H and 216D); *R v Bateson* (1969) 54 Cr App R 11 and *R v Wright* (1974) 58 Cr App R 444 followed.

(2) The judge had further misdirected himself as regards the burden of proof on the defence. It was wrong for the judge to have criticized the defence for having failed to put to the investigating the personal particulars of Che Mat, for the simple reason that they had been disclosed in the appellant's cautioned statement. Thus, the onus was upon the prosecution, and not the defence, to disprove the appellant's version of the facts. On this ground also, the conviction had to be quashed (see p 219E–G).

(3) Nowhere in his judgment did the judge direct attention to the statutory presumptions as to possession (s 37(d) of the Act) and trafficking (s 37(da) of the Act), and as a result, he made no finding as to whether the defence had rebutted the same. This amounted to a misdirection in law by way of non-direction (see p 219I); *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 followed.

(4) As there was an acute conflict of evidence on a material point, namely, the result of the search of the person of the accused, and a search list contemporaneously prepared by the police, a copy thereof ought to be tendered in evidence. If it was not tendered, the presumption to be made pursuant to s 114(g) of the Evidence Act 1950 was, the evidence would have been unfavourable to the prosecution if it was produced. The judge in this case had wrongly assumed that a copy of the search list was in evidence, and that its contents supported the version of ASP Abdul Wahab (see p 220G).

(5) Although no objection had been raised to the admission of one of the statement made by ASP Abdul Wahab which was clearly based on hearsay and therefore inadmissible, the judge was nevertheless under an automatic duty to stop it from being adduced, for inadmissible evidence does not become admissible by reason of failure to object (see p 221A).

Per curiam:

Where a judge makes an adverse comment about a belated disclosure of defence, without an accompanying statement that the accused was under no obligation to make prior disclosure and that the judge was not drawing an inference of guilt from the belatedness of the explanation offered by the accused, such comment would usually be unfair and constitute a misdirecton in law so serious that the conviction is liable to be quashed on that ground alone (see p 216I); *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553 followed.

[Bahasa Malaysia summary

Perayu telah dituduh dengan kesalahan pengedaran ganja bercanggahan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pembelaannya, yang diberikan dari kandang saksi, ialah bahawa dia hanya merupakan seorang pembawa yang tidak bersalah. Dia menuntut bahawa dia menjual keropok udang sebagai mata pencarian, dan bahawa apabila dia ditangkap, dia benar-benar mempercayai bahawa dia sedang membawa keropok udang atas perintah seorang yang bernama Che Mat, atas upah RM300. Pembelaan tersebut selaras dengan suatu pernyataan beramaran yang dibuat kepada polis sehari selepas penangkapannya ('pernyataan beramaran'), kerana dalam pernyataan beramaran, di telah meyebut tentang Che Mat, nombor telefonnya dan tempat tinggalnya. Hakim mendapati bahawa pendakwa telah membuktikan suatu kes milikan eksklusif, jagaan, kawalan dan pengetahuan ganja yang dijumpai daripada perayu, dan bahawa perayu telah gagal menimbulkan keraguan munasabah. Dalam alasan penghakiman, hakim mencadangkan bahawa perayu mempunyai masa yang cukup untuk mereka cerita mengenai penghantaran keropok udang, memandangkan pernyataannya dibuat sehari selepas penangkapannya. Hakim juga telah mengecam pembelaan kerana tidak memberitahu pegawai penyiasatan tentang butir-butir Che Mat, dan gagal menerangkan kenapa, mengikut ASP Abdul Wahab, senarai pemeriksaan yang telah disampaikan kepadanya pada pagi penangkapan telah menunjukkan bahawa hanya RM63 dijumpai dalam dompetnya, walaupun perayu telah menyatakan bahawa dia telah dibayar RM300 oleh Che Mat. Perayu telah disabitkan dan dihukum mati. Perayu telah merayu atas alasan bahawa kritik hakim adalah tidak berjustifikasi. Perayu telah disabitkan dan dihukum mati. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan itu: A

(1) Hakim telah silap dalam pengendalian fakta-fakta apabila beliau mempertimbangkan kes pembelaan. Beliau telah menganggap bahawa terdapat pengemukaan pembelaan yang lewat, yang mencadangkan bahawa perayu membuat-buat cerita. Walau bagaimnapun, bukti menunjukkan bahawa peluang pertama untuk B perayu memberi penjelasan ialah hari selepas penangkapannya, apabila dia ditemuduga dan pernyataannya direkod. Tidak terdapat bukti penangguhan pada pihak perayu dalam memberi penjelasan. Maka, hakim telah salah arah dirinya, dan ini akan dianggap sama dengan salah arah kepada juri. Atas alasan ini sahaja, sabitan perayu harus dibatalkan (lihat ms 215F–H dan C 216D); *R v Bateson* (1969) 54 Cr App R 11 and *R v Wright* (1974) 58 Cr App R 444 diikut.

(2) Hakim tersebut juga telah salah arah diri-sendirinya tentang beban bukti pembelaan. Adalah salah untuk hakim tersebut mengkritik pembelaan kerana gagal memberitahu pegawai D penyiasat tentang butir-butir Che Mat, atas sebab yang jelas, iaitu butir-butir tersebut telahpun dikemukakan dalam pernyataan beramaran perayu. Maka, ia merupakan tanggungjawab pihak pendakwa dan bukannya pembela, untuk membuktikan salah versi fakta perayu adalah salah. Atas alasan ini juga, sabitan E harus dibatalkan (lihat ms 219E–G).

(3) Tidak ada tempat dalam penghakiman di mana hakim memberikan perhatiannya kepada anggapan statutori tentang milikan (s 37(d) Akta tersebut) dan pengedaran (s 37(da) Akta tersebut), dan oleh itu, beliau tidak membuat keputusan sama ada pembelaan telah mematahkan anggapan tersebut. Ini F merupakan suatu salah arah undang-undang secara tidak melakukan arahan (lihat ms 219I); *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 diikut.

(4) Oleh kerana terdapat konflik keterangan yang amat besar atas suatu perkara yang material, iaitu, keputusan carian ke atas G perayu, dan senarai pemeriksaan yang disediakan secara serentak oleh police, sesalinan senarai tersebut harus dikemukakan sebagai keterangan. Jika ia tidak dikemukakan, anggapan yang dibuat menurut s 114(g) Akta Keterangan 1950 ialah, keterangan yang berkenaan akan memudaratkan pendakwa jika ia dikemukakan. Hakim dalam kes ini telah melakukan kesalahan dengan H mengganggap bahawa sesalinan senarai pemeriksaan telah dikemukakan sebagai keterangan, dan bahawa kandungannya menyokong versi ASP Abdul Wahab (lihat ms 220G).

(5) Walaupun tidak ada bantahan yang telah ditimbulkan terhadap satu daripada pernyataan yang dibuat oleh ASP Abdul Wahab I yang jelas merupakan dengar cakap dan oleh itu tidak boleh diterima, hakim dengan automatiknya mempunyai tanggungjawab untuk menghalangnya daripada dikemukakan, kerana keterangan yang tidak boleh diterima tidak boleh menjadi boleh diterima akibat kegagalan untuk membantah (lihat ms 221A).

Per curiam:

Apabila seseorang hakim membuat ulasan yang memudaratkan berkenaan dengan pengemukaan pembelaan yang lewat, tanpa menyertakan suatu pernyataan bahawa tertuduh tidak berkewajipan untuk membuat pengemukaan pada masa yang lebih awal, dan bahawa hakim tidak membuat inferans kesalahan daripada kelewatan penjelasan yang diberi oleh tertuduh, ulasan yang berkenaan biasanya adalah tidak adil dan merupakan suatu salah arah dari segi undang-undang yang begitu serius sehingga sabitan yang terlibat akan dibatalkan atas alasan itu sahaja (lihat ms 216I); *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553 diikut.]

Notes

For a case on misdirection of burden of proof, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 315.

For cases on presumptions, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1281–1359.

For cases on hearsay evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1004–1066.

For cases on Dangerous Drugs Act 1952, see 4 Mallal's Digest (4th Ed) paras 26–108; [1989] Mallal's Digest 592–621; [1990] Mallal's Digest 463–467; [1991] Mallal's Digest 820–849; [1992] Mallal's Digest 657–671; [1993] Mallal's Digest 526–538; [1994] Mallal's Digest 849–870.

Cases referred to

Balasingham v PP [1959] MLJ 193
Lister v Quaife [1983] 1 WLR 48
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169
Maxwell v DPP [1935] AC 309
PP v Alcontara a/l Ambross Anthony [1993] 3 MLJ 568
Pratt v AG of Jamaica [1994] 2 AC 1
R v Bateson (1969) 54 Cr App R 11
R v Hoare [1966] 2 All ER 846
R v Littleboy [1934] 2 KB 408
R v Ryan (1964) 50 Cr App R 144 CCA
R v Sullivan (1967) 51 Cr App R 102
R v Wright (1974) 58 Cr App R 444
Teng Boon How v Pendakwa Raya [1993] 3 MLJ 553
Vijayaratnam v PP [1926] 28 MLJ 106

Legislation referred to

Dangerous Drugs Act 1952 ss 39B(1)(a), 37(d), (da), 40(1), (2), (3)
Evidence Act 1950 s 114(g)
Jamaican Constitution s 17(1)

Appeal from: Criminal Suit No 44(58)-39-88 (High Court, Pulau Pinang)

Karpal Singh (Jagdeet Singh with him) *(Karpal Singh & Co)* for the appellant
Stanley C Augustin (Deputy Public Prosecuter) for the respondent.

Edgar Joseph Jr FCJ (delivering the judgment of the court): In the view we took of this appeal, it is unnecessary for us to deal with the facts of the case at any great length.

Suffice it to say, so far as the facts are concerned, that this appeal is a sequel to our judgment in *PP v Alcontara a/l Ambross Anthony* [1993] 3 MLJ 568, wherein we had reversed the judgment of acquittal entered at the close of the case for the prosecution by the judge in favour of the accused, who is the appellant herein, on a charge that he did, on 11 August 1987 at 5.30am, at Jambatan Permatang Tok Labu, Kepala Batas, Seberang Perai, in the district of Butterworth, in the state of Pulau Pinang, traffick in a dangerous drug, to wit, cannabis, weighing 70,952.1g, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), on the ground of misdirection as to the sufficiency of the expert testimony of the chemist on the question whether the subject matter of the charge was 'cannabis' within the meaning of s 2 of the Act. Pursuant to our order, the judge, was obliged to, and did, call upon the appellant to enter upon his defence. The appellant made his defence from the witness box, but called no witnesses. In the event, he was convicted, and sentenced to death, that being the mandatory sentence required by law. The appellant appealed against that conviction. At the conclusion of the arguments, we allowed his appeal, quashed the conviction, set aside the sentence of death, and acquitted and discharged him. Our reasons for doing so now follow.

The short facts were these: on the date, and at the time and place mentioned in the charge, acting on information received, a party of police personnel had stopped a Mitsubishi Colt Gallant car, bearing registration No WBE 2789, being driven by the appellant who was the sole occupant thereof.

The search conducted of the boot of the car resulted in the recovery of the considerable quantity of the cannabis hereinbefore mentioned. He was promptly arrested and later prosecuted as aforesaid. His defence, as deposed to from the witness box, was that he was an innocent carrier. More particularly, he claimed that he sold 'keropok' (prawn crackers) for a living, that at the time of his arrest, he honestly believed that he was conveying 'keropok'; that he did so at the behest of a certain Che Mat, for a fee of RM300 which had been paid and was in his pocket, and that this money was amongst the various items seized by the police. This defence, though it was not without flaws which need not detain us, was entirely consistent with his cautioned statement made to the police on the day after his arrest, for in it, he had mentioned Che Mat, and a telephone number which he claimed was Che Mat's, but he was unable to give Che Mat's residential address. However, he had offered to lead the police to Che Mat's place of abode but the police had not given him the opportunity to do so. The judge, however, found that the prosecution had established 'an absolutely

A overwhelming circumstantial case of exclusive possession, custody, control and knowledge of the cannabis recovered from the boot of the car, and that his explanation had failed to raise a reasonable doubt.'

The real point in this appeal arises from certain passages (specified below) in the grounds of the judgment wherein the judge had criticized the B defence, in terms which were totally unjustified.

In the first place, the judge had erred in his handling of the facts when considering the defence case, in that he had *assumed*, contrary to the evidence, that there had been *a belated disclosure* of the defence, and in specifically relying on this as a ground for rejecting the defence. This is C how he put it:

> The accused did not deny that he was, at the material time of arrest, the sole occupant of the said car wherein exhibits P3 to P10 were found, but contended that at all material times, he was labouring under the belief that he was conveying 'keropok' in the boot of the said car. The court is mindful that in the instant case the accused made his statement (D14) at 11.25am on 12 D August 1987, whereas he was arrested on 5.30am on 11 August 1987 which gave him sufficient time to *concoct the story about his transportation of 'keropok'*. (p 108, para 2 of the appeal record).

And, a little further down he added:

> The character Che Mat was a figment of the accused's imagination plucked E from the air while he was obliged to sit in the lock-up (p 111, para 1 of the appeal record).

It is implicit in the judge's observations aforesaid that he had *assumed* that at the time of his arrest, the appellant had no explanation to offer *or* if he had one, it would have been materially *different* to that which he had F offered in his cautioned statement recorded on the next day *or* he would have made a *confession*. With respect, there was not a scrap of evidence to support any of these *assumptions*. For example, there was not even evidence as to whether the appellant had been cautioned and an attempt made to interrogate him immediately on arrest and, if so, what his reactions were.

G Thus, the evidence suggests that the *first opportunity* the appellant had to explain was at the time he was interviewed, and his cautioned statement recorded from him the day after his arrest. There was, therefore, no evidence of *delay* on his part in offering an explanation. On the other hand, evidence suggests that such delay, as there was in this regard, had been occasioned entirely by the police. It follows that it was wrong for the judge to have H *assumed*, contrary to the evidence, that there had been a *belated* disclosure of the defence, which suggested concoction. On the contrary, the evidence indicates that, given the circumstances, the appellant had made *prompt disclosure* of his defence in his cautioned statement.

As a result of this misdirection, the case for the appellant must have I been seriously weakened in the eyes of the judge, and the chance of his attaching any degree of credence to it seriously prejudiced.

In *R v Bateson* (1969) 54 Cr App R 11 (not cited to us), the misdirection complained of was a suggestion that the accused had never given his version

before the trial when in fact he had, and on this ground alone, the conviction was quashed. In delivering the judgment of the Court of Appeal, Salmon LJ (as he then was) said this (at p 18):

> We do not of course know at what conclusion this jury would have arrived had the summing up not contained the passage (suggesting that the appellant had never told his story before the trial) to which we have referred. They might still have found him guilty. But, it is quite impossible to say that it is not at any rate on the cards that they would have found him not guilty. This passage does constitute a misdirection. It is not supported by any evidence. It is clearly contrary to what we now know to be the true facts.

In *R v Wright* (1974) 58 Cr App R 444, Scarman LJ said:

> At the end of the day, where the appellant's case is not that the judge erred in law but that the judge erred in his handling of the facts, the question must be, first of all, was there error, and secondly, if there was, was it significant error which might have misled the jury?

In the present case, as in others of this class, we must treat the misdirection of a judge of himself in the same way as an erroneous direction to a jury.

On this ground alone, we were of the view that the conviction could not stand and had, therefore, to be quashed.

But, before we move on to consider other aspects of this appeal, we think it would not be out of place if we said something by way of guidance to the courts below when criticizing an accused person for having made a belated disclosure of his defence. It goes without saying that our remarks which follow apply only to those cases where there has, in fact, been a belated disclosure of the defence.

It is clear law that a judge must tread warily when commenting on the fact that an accused has chosen to conceal the lines of his defence until the trial, rather than disclosing them at or about the time of his arrest during police interrogation. He may observe that such a stance would make it difficult for the police to check the veracity of the accused's version of the facts, and so, detracts from the *weight* to be accorded to it. (See *R v Littleboy* [1934] 2 KB 408; *R v Ryan* (1966) 50 Cr App R 144). That, however, is as far as he can go, for should he go further and infer that such non-disclosure provides a basis for assuming that the accused is *guilty* (see eg *R v Sullivan* (1967) 51 Cr App R 102; *R v Hoare* [1966] 2 All ER 846), he would be misdirecting himself in law.

Having said that, we must add that, when a judge has made an adverse comment about the belated stage at which an accused had made disclosure of his defence, *without an accompanying statement that the accused was under no obligation to make such prior disclosure, and that he is not drawing an inference of guilt from the belatedness of the explanation offered*, such comment would usually not be fair, and so would constitute a misdirection in law so serious that the conviction is liable to be quashed on this ground alone. In this context, we would draw attention to a recent decision of this court in *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553, where many of the relevant authorities on this point are referred to and analyzed. In particular,

A we would refer to the following passages in the judgment of the court (at p 565):

> Be that as it may, the judge failed to recognize, firstly, that the appellant had a right to silence when interrogated by the police, whether before or after being cautioned. Indeed, the terms of the statutory caution under proviso (b) to s 37A(1) of the Dangerous Drugs Act 1952 merely remind him of a right he already has at common law to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence (per Lord Diplock in *R v Hall* [1971] 1 WLR 298). The exception to this rule, is where the defence of the accused is an alibi (see the statutory obligation on an accused to give notice to the prosecution of a defence of alibi under s 402A of the Criminal Procedure Code (FMS Cap 6)). Even prior to the introduction of s 402A of the Criminal Procedure Code (FMS Cap 6), an alibi defence was an exception to the rule that it is improper for a judge to make any adverse comment on the failure of an accused to disclose his defence until the trial. (See eg *R v Chhui Yi* [1936] MLJ 142 and *Fazal Din v PP* [1949] MLJ 123).
>
> Secondly, although a judge may properly comment that an explanation has been given for the first time at the trial, this has to be done with care and fairness to the accused in all the circumstances of the case. (See *R v Ryan* [1973] 2 NZLR 611). The Privy Council and English authorities show that the dividing line between what is fair comment and what is not, has been recognized to be a fine one. (See 11 *Halsbury's Laws of England* (4th Ed) para 299; *Archbold Pleading Evidence and Practice* (1992) paras 4–407.)
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> It has been said that there is a clear distinction between drawing an inference of guilt from prior silence and taking into consideration such silence as diminishing the weight of any explanation given by the accused for the first time at the trial. However, as Lord Dilhorne, speaking for the Court of Appeal in *R v Gilbert* [1977] 66 Cr App R 237; [1978] Crim LR 216) rightly pointed out, there is no clear dividing line, as in each situation the jury are invited to draw an inference adverse to the accused on account of his exercise of the right to silence. It follows that, in practice, the distinction is too fine to be of any practical value even if the trial is before a judge sitting alone.
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> Where the judge takes into consideration the belatedness of an explanation offered by an accused for the first time at the trial as diminishing the weight of that explanation this will usually not be fair unless he makes it clear that he recognizes the right of the accused to remain silent and that he is not drawing an inference of guilt from such silence. No particular form of words is necessary, provided his mind on the matter is clearly revealed in his judgment. In the present case, the judgment of the judge clearly suffers from these defects and so there was clearly a misdirection on this score.

We now turn to consider three further grounds for our holding that the appeal was bound to succeed.

First, the judge had misdirected himself as regards the burden of proof, especially the burden on the defence. More particularly, as will appear from the following passages in his grounds of judgment, the judge had criticized the defence for not having put to the investigating officer, the name of Che Mat, the latter's telephone number, and address of place of abode. This is

how the judge put it:

> (1) Furthermore, if the character of Che Mat existed then it is incumbent on the defence to put this question to the investigating officer ...
>
> (2) It is settled law that the defence, by its failure so to put such questions to the prosecution witnesses, ought not be allowed to raise such issues at the defence stage.
>
> (3) Prosecution witnesses were also not challenged as to whether the police had taken steps (at any rate, not fatal to the prosecution witnesses) to check on the telephone number given in D14 (the cautioned statement) or to locate Che Mat's house with the assistance of the accused and this became the only issue during the defence case.

Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention – in other words, 'kept up its sleeve', as it were – and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

At this stage, we would interpolate to remark – though we are digressing somewhat from the point concerning the onus of proof – that the judge went so far as to hold 'that the defence by its failure so to put such questions to the prosecution witnesses *ought not to be allowed to raise such issues* at the defence stage'. In this, he was clearly wrong, since it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it. We are supported in this by the case of *Lister v Quaife* [1983] 1 WLR 48 decided by the Court of Appeal in England. May LJ in his judgment at p 54 of the report said this:

> We have not found this at all an easy case but in the end we have come to the clear conclusion that the answer really lies in a proper appreciation of what s 9 in fact achieves. As I have already said, this is that the contents of the statements read are evidence in the case just as if, and only to the extent as if, the makers of those statements had been called as witnesses in the trial and had given the evidence contained in the statements. If that had happened on the hearing before the King's Lynn justices in this case, and there had been no cross-examination about the possibility of mistake, or their evidence had not been challenged in any way, then when the defendant went into the witness box no doubt strong comment could have been made that nothing had been put to the witnesses about the possibility that the defendant might indeed have been able to and did buy the dress somewhere else, in Portsmouth in particular, on 2 July 1981.

A Although any such comment by the prosecutor would have had substantial force and might well have led the justices to view the defendant's evidence with a degree of scepticism, the position remains that the burden throughout was on the prosecutor, and although the proper procedure of putting a defence case to prosecution witnesses had not been followed, it would have been open to the justices, having heard all three witnesses, to have said:
B 'Well, it may be that that procedure laid down by Marks & Spencer was what should have happened, and it may have happened in at least the majority, if not every other case concerning a dress of this nature, but we have also seen the defendant. She has given evidence. We cannot say that her evidence cannot be true, and in those circumstances there must be a doubt in our minds and accordingly we must acquit.

C Stephen Brown J said at p 55:

This case has very many unsatisfactory features, but I have great sympathy with the justices in the position into which they were put, not through their own fault. In the end, however, it is they who had the duty of weighing the evidence which had been properly admitted before them and the decision of
D fact was entirely for them. Whilst it may be that this court might itself have come to a different conclusion, none the less it seems to me to be impossible to interfere with the decision of the justices, which was fully within their competence. Therefore, I agree with May LJ that this appeal must be dismissed.

To resume our discussion regarding the important point of misdirection as
E regard the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the judge to have criticized the defence for having failed to put to the investigating officer, the name of Che Mat, or the latter's telephone number or his place of abode, for the simple reason that these particulars *had* been disclosed in the cautioned statement of the appellant made the day after his arrest so that the police
F had all the time in the world to check their veracity. That being the case, the onus was on the prosecution to check on whether the appellant's version of the facts, as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts. The defence were, therefore, under no duty to put the
G matters aforesaid to the investigating officer, having regard to their prior disclosure in the cautioned statement. In holding to the contrary, the judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be
H quashed.

This brings us to the next point in this appeal. Nowhere in his judgment did the judge direct attention to the statutory presumptions as to possession (s 37(d)) and trafficking (s 37(da)), and as a result, he made no finding as to whether the defence had rebutted the same. In our view, this was a
I misdirection in law by way of non-direction having regard to the following passage in the judgment of Azmi SCJ in *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, at p 172 para 1:

In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory

presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction. A

Having said that, we would add there may well be cases where because of the absolutely overwhelming nature of the *affirmative evidence* led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, we consider that the trial court should, specifically, so find. B

The ante-penultimate point upon which we must now touch concerns the alleged search list, upon which the judge relied in convicting the appellant, but which in fact, was never adduced in evidence. C

This is how the judge put it (at p 109, para 2 of the record of appeal):

> He (the accused) said that he was paid RM300 by Encik Mat for the services rendered, yet he could not explain why, according to ASP Abdul Wahab (PW3), only RM63 was found on him in his wallet, *as shown in the search list served on him on the morning of the arrest.* (Emphasis supplied) D

Had the judge simply preferred the testimony of ASP Abdul Wahab to that of the appellant on the question whether it was RM300 or RM63 which was recovered from the latter, without mentioning the search list, no exception could have been taken, to such a course. But, the words 'as shown in the search list served on him on the morning of the arrest', show clearly that the judge preferred the testimony of ASP Abdul Wahab, on the basis that that testimony was supported by the contents of the alleged search list, when the search list was not even in evidence. This was an error on a most material point, which was directly relevant to the defence advanced by the appellant that he was an innocent carrier, and had occasioned serious prejudice to the appellant. E F

We must add that, in a situation such as this, where there was an acute conflict of evidence on a material point, namely, the result of the search of the person of the accused, and a search list contemporaneously prepared by the police was presumably in existence, a copy thereof, ought, in all fairness, to be tendered in evidence or its non-production accounted for, the sanction for not doing so being the presumption, that if produced, it would have been unfavourable to the prosecution. (See s 114(g) Evidence Act 1950). Instead, the judge did the opposite – he wrongly assumed that a copy of the search list was in evidence, and went on to presume that its contents supported the version of ASP Abdul Wahab. G H

The penultimate point which arose for consideration concerned the admission of certain irrelevant, inadmissible and gravely prejudicial evidence, to wit, that part of the testimony of ASP Abdul Wahab wherein he gave an account of the briefing he had given his men on the night before he had mounted the road block to stop and search the car driven by the appellant; more particularly, he said this, 'I informed them [his men] that information had been received that a certain Indian would be travelling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah, proceeding from I

A kawasan Permatang Bendahari towards Pulau Pinang.' Now, this statement by ASP Abdul Wahab was clearly based on hearsay, was prejudicial to the appellant, and therefore, inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to B object.

In *Vijayaratnam v PP* [1926] 28 MLJ 106, M Hashim J had to consider a similar point, and went so far as to say (at p 106 col 2D):

> I think, if possible, the expression 'on information received' should not be C used by police officers when giving evidence. It would appear to mean that somebody has given information, which may be hearsay, to the police and the police act on this information. In this particular case, the police witness went on to say that on arrival at the scene, he laid an ambush. This statement, read in conjunction with the expression 'on information received', would tend to indicate that the police had been told that an offence would be committed. In D my opinion, this would, to say the least, cloud the issue when the trial commenced and it might to a certain degree prejudice the court against the appellant. To put it in another way, there was a probability that the court trying the appellant was, to a certain extent, influenced by the opening statement of the police witness. In my opinion, such a state of affairs should be avoided.

E Whilst we agree with much of what M Hashim J said in that case, we consider that in appropriate circumstances, there is nothing objectionable in a law enforcement officer saying, by way of introduction that, 'acting on information received', he took certain steps in the investigation. However, when such testimony is given, care must be taken not to divulge the F contents of the information, as happened in the present case, since this may well be open to the objection that it is hearsay and, in all probability, prejudicial to the accused. Moreover, we must mention that in trials for any offence under the Act, sub-ss (1) and (2) of s 40 provide for special rules of evidence relating to the protection of informers – but note the exception provided for under sub-s (3) of s 40.

G Although the judge had not referred to that part of ASP Abdul Wahab's testimony, quoted above, the possibility that he was swayed by it could not be ruled out (see *Balasingham v PP* [1959] MLJ 193 at p 194, col 2F to H, per Ismail Khan J (later CJ Borneo), and its effect might well have been to prejudice the case for the appellant.

H There is a final point which must be made. Nowhere in his judgment did the judge make the basic finding that the appellant was a trafficker within the meaning of the Act. In certain cases, this by itself could be a fatal flaw sufficient to vitiate the conviction, but the present case was not such a case since the defence here was a denial of knowledge as to the nature of the I offending exhibit, that is to say, the defence of being an innocent carrier. Different considerations would arise, where, for instance, an accused admits possession of a drug but denies being a trafficker.

In conclusion, we must add that the appellant in this case may well

consider himself a very fortunate man, because had the case been more thoroughly investigated, and had the judge not misdirected himself in the manner he did, a conviction might well have resulted. This is, therefore, yet another case where we found that our desire to allow what might well have been a deserved conviction to stand must be sacrificed to the general principle of fairness in criminal trial. This is the principle stated by Lord Blanesborough, LC when speaking for the judicial committee of the House of Lords in *Maxwell v DPP* 24 Cr App R 152, at p 176:

> It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of prosecutions should be disregarded and discredited.

For the sake of completeness, we would add that no attempt had been made by the learned deputy to ask for a retrial. In our opinion, the learned deputy was right in not having done so, considering that the appellant had lived in the shadow of the gallows for all these years. In such a situation, it would have been approaching the confines of torture to have ordered a retrial. It is interesting to note that the judicial committee of the Privy Council has, in *Pratt v AG of Jamaica* [1994] 2 AC 1, observed (at p 35G) that, 'in any case in which execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment"' within s 17(1) of the Jamaican Constitution.

It was for the foregoing reasons that the conviction was quashed, the sentence of death set aside, and the appellant acquitted and discharged.

Appeal allowed.

Reported by Choo Siew Ling